1996

Christina R. Stokes v. Mary J. Pulley, Wendell Hansen, Camille Fowler, Jim Hansen and Regan Hansen : Brief of Appellee

Utah Court of Appeals

T. McKay Stirland; Donald E. McCandless; Fisher, Scribner & Stirland; Attorneys for Appellees.
Helen H. Anderson; Howard, Lewis & Peterson; Attorneys for Appellant.

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

CHRISTINA R. STOKES,	:	
	:	Case No. 960692 (960400337)
Plaintiff-Appellant,	:	
vs.	:	Oral Argument Priority 15
MARY J. PULLEY, WENDELL HANSEN, CAMILLE FOWLER, JIM HANSEN and REGAN HANSEN,	:	
Defendants-Appellees.	:	

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, JUDGE RAY M. HARDING SR.

HELEN H. ANDERSON
HOWARD, LEWIS & PETERSEN
-120 East 300 North
Provo, UT 84601
ATTORNEYS FOR APPELLANT

T. McKAY STIRLAND
DONALD E. MCCANDLESS
FISHER, SCRIBNER & STIRLAND
2696 N. University Ave., Suite 220
Provo, UT 84604
ATTORNEYS FOR APPELLEES

IN THE COURT OF APPEALS

OF THE STATE OF UTAH

CHRISTINA R. STOKES,	:	
	:	Case No. 960692 (960400337)
Plaintiff-Appellant,	:	
vs.	:	Oral Argument Priority 15
MARY J. PULLEY, WENDELL HANSEN, CAMILLE FOWLER, JIM HANSEN and REGAN HANSEN,	:	
Defendants-Appellees.	:	

BRIEF OF APPELLEE

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY, STATE OF UTAH, JUDGE RAY M. HARDING SR.

HELEN H. ANDERSON
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, UT 84601
ATTORNEYS FOR APPELLANT

T. McKAY STIRLAND
DONALD E. MCCANDLESS
FISHER, SCRIBNER & STIRLAND
2696 N. University Ave., Suite 220
Provo, UT 84604
ATTORNEYS FOR APPELLEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited:

Rules Cited:

Treatises Cited:

JURISDICTION

Jurisdiction is proper in this court pursuant to Utah Code Ann. section 78-2-2(4) and 78-2a-3(2)(k).

ISSUES PRESENTED

1. Whether a close family relationship between the property owners in a boundary by acquiescence case creates a presumption of, or carries greater weight as to, nonacquiescence in the artificial boundary.

2. Whether the district court improperly found that the owners of the two properties prior to 1967 mutually acquiesced in the artificial boundary?

3. Whether the district court improperly found that the two properties were adjoining, and improperly concluded that boundary by acquiescence had been established, where the two properties are not adjoining according to modern contemporary legal descriptions.

Appellee does not contest the statement of the issues as presented by appellant. Appellee does contest whether issues 1 and 2 above were properly preserved for appeal in the trial court, and whether they were properly docketed.

STANDARD OF REVIEW

1. Appellant's first issue involves a conclusion of law. (Brief of appellant at 1) Review of a trial court's conclusions of law are based on a correction of error standard, granting no deference to the trial court. Marchant v. Park City, 771 P.2d 677, 680 (Utah App. 1989), aff'd, 788 P.2d 520 (Utah 1990); Lake

Philgas v. Valley Bank and Trust Company, 845 P.2d 951, 955 (Utah App. 1993).

2. Appellant's second issue on appeal attacks a factual finding of the trial court. (Brief of appellant at 2) Appellate courts reviewing a trial court's findings of fact apply a clearly erroneous standard, and will not lightly disturb those findings. Alta Industries Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993). An appellant attacking a factual determination has an obligation to marshal the evidence in support of the determination made by the finder of fact, then demonstrate why it is deficient. Crookston v. Fire Insurance Exchange, 817 P.2d 789, 799, 800 (Utah 1991); Gillmor v. Wright, 850 P.2d 431, 433 (Utah 1993).

3. Appellant's third issue on appeal mixes a challenge of a finding of fact and a conclusion of law. Appellate review of findings of fact applies a clearly erroneous standard. Alta Industries Ltd. v. Hurst, 846 P.2d 1282, 1286 (Utah 1993); Von Hake v. Thomas 705 P.2d 766, 769 (Utah 1985). An appellant attacking a factual determination must marshal the evidence in support of the determination made by the finder of fact, then demonstrate why it is deficient. Crookston v. Fire Insurance Exchange, 817 P.2d 789, 799, 800 (Utah 1991). Legal conclusions are based on a correction of error standard. Jacobs v. Hafen, 917 P.2d 1078, 1080 (Utah 1994).

DETERMINATIVE AUTHORITY

There are no constitutional provisions, statutes or rules of central importance to this appeal.

STATEMENT OF THE CASE

A. Nature of the Case: This case involves ownership of real property located in American Fork, Utah. Appellant claims title by deed, defendant by boundary by acquiescence.

B. Statement of Facts: All of the property presently in dispute between the parties was once part of a larger parcel of property owned by Andrew Pulley. (R. at 311-310) In 1934, Andrew Pulley conveyed approximately one acre of the property to his son Adolphus Pulley. (R. at 310) In 1946, Andrew Pulley conveyed all the remainder of his property to his daughter defendant Mary Pulley. The property was deeded to defendant Mary Pulley using the following legal description:

> Beginning at the center of section of Section 18, Township 5 south, Range 2 east, Salt Lake Base and Meridian; thence west 27.15 chains; thence south 85 56' west 6.18 chains; thence north 4.58 chains; thence west 3.28 chains; thence north 2.50 chains; thence west 4.00 chains; thence north 7.00 chains; thence east 25.00 chains; thence south 6.50 chains; thence east 15.00 chains; thence south 20.00 chains to place of beginning. Area 75.85 acres more or less. (R. at 310-309)

The property carved out of the larger Andrew Pulley parcel and conveyed to Adolphus Pulley by his father andrew was described in that deed as follows:

> Beginning 16.50 chains North of the Southwest corner of the Northwest quarter of Section 18, Township 5 south, Range 2 East of the Salt Lake Base and Meridian; thence North 2.50 chains East 4.00 chains; thence south 2.50 chains; thence west 4.00 chains to the place of beginning. Area 1.0 acres.

Plaintiff eventually came to purchase the 1 acre parcel originally conveyed to Adolphus Pulley. Defendant Mary Pulley eventually transferred much of her property received from her father Andrew, but retained the portion which abuts plaintiff's property. (R. at 240) Because the legal descriptions of Mary Pulley's parcel and plaintiff's parcel commenced from different starting points, there is a description gap between the properties. (R. at 0412-0415) None of the remaining property has been deeded to other parties. (R. at 0416) Despite the description gap, plaintiff possesses the amount of property which Adolphus Pulley originally deeded to Andrew Pulley. (R. at 0416-0418)

Adolphus Pulley held the property which he was deeded by his father until he died. The property was then held by Thelma Pulley, Adolphus' wife, until 1967 (R. at 240). Trees were planted along the boundary between the properties in approximately 1944. (R. at 0468) (R. at 499) The area between the 1940's tree and fence line, and the legal description is the area in dispute in this matter. (R. at 308)

In 1967, Thelma Pulley sold her property to Lewis and Caroline Madsen. (R. at 240) The Madsens conveyed the property to Charles and Zena Boyer in 1973. (R. at 240) The Boyers sold the property to Plaintiff in 1979. Plaintiff and Defendant both claim ownership of the disputed property. (R. at 17)

C. Proceedings Below:

Plaintiff filed this action for quiet title and trespass on

DETERMINATIVE AUTHORITY

There are no constitutional provisions, statutes or rules of central importance to this appeal.

STATEMENT OF THE CASE

A. Nature of the Case: This case involves ownership of real property located in American Fork, Utah. Appellant claims title by deed, defendant by boundary by acquiescence.

B. Statement of Facts: All of the property presently in dispute between the parties was once part of a larger parcel of property owned by Andrew Pulley. (R. at 311-310) In 1934, Andrew Pulley conveyed approximately one acre of the property to his son Adolphus Pulley. (R. at 310) In 1946, Andrew Pulley conveyed all the remainder of his property to his daughter defendant Mary Pulley. The property was deeded to defendant Mary Pulley using the following legal description:

> Beginning at the center of section of Section 18, Township 5 south, Range 2 east, Salt Lake Base and Meridian; thence west 27.15 chains; thence south 85 56' west 6.18 chains; thence north 4.58 chains; thence west 3.28 chains; thence north 2.50 chains; thence west 4.00 chains; thence north 7.00 chains; thence east 25.00 chains; thence south 6.50 chains; thence east 15.00 chains; thence south 20.00 chains to place of beginning. Area 75.85 acres more or less. (R. at 310-309)

The property carved out of the larger Andrew Pulley parcel and conveyed to Adolphus Pulley by his father andrew was described in that deed as follows:

> Beginning 16.50 chains North of the Southwest corner of the Northwest quarter of Section 18, Township 5 south, Range 2 East of the Salt Lake Base and Meridian; thence North 2.50 chains East 4.00 chains; thence south 2.50 chains; thence west 4.00 chains to the place of beginning. Area 1.0 acres.

the court below. (Brief of appellant at 1) Plaintiff argues that this issue was raised implicitly at the trial level. (R. at 550-551) (See Appendix III)

Plaintiff's second issue alleges there was no acquiescence to the boundary between the parties real property prior to 1967. (Brief of appellant at 2) Again, plaintiff failed to preserve this issue in the court below. And again, plaintiff claims to have preserved the issue implicitly, and also by pre-trial memorandum. (Brief of Appellant at 2) (R. at 550-551, 102-101) (See Appendix III) Examination of the record reveals neither plaintiff's first or second issue on appeal was ever raised or preserved in the trial court. Plaintiff now urges the court to consider these issues for the first time on appeal. (R. at 550-551, 102-101) (See Appendix III)

Utah law precludes consideration of appellate issues which were not first raised in the court below. Because plaintiff's first two issues were not raised or preserved, they cannot be considered. Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799, 801-02 (Utah App. 1987).

Failing to raise or preserve her first two issues in the trial court, plaintiff also failed to preserve the issues in her docketing statement. Plaintiff did not file an amended docketing statement, denying defendant the opportunity to file a motion for summary disposition on the issues which were not docketed. (See Rules 9, 10, Utah Rules of Appellate Procedure) Issues not

June 21, 1994. (R. at 3-1) Defendant/Appellee answered and filed a counterclaim on August 11, 1994. (R. at 23-16) Plaintiff answered the counterclaim on September 8, 1994. (R. at 27) Plaintiff filed a summary judgment motion on March 14, 1995. (R. at 51-50) The motion was denied on May 5, 1995. (R. at 120) Defendants filed a motion for summary judgment on November 9, 1995, which was denied on January 2, 1996. (R. at 176-175, 276-275) A bench trial was held on March 21, 1996. (R. at 323-565) Findings of fact, conclusions of law, and a judgment were entered for the defendants on May 21, 1996. (R. at 311-303) Plaintiff filed this appeal. (R. at 318-317)

SUMMARY OF THE ARGUMENT

This matter is an appeal from a verdict quieting title to disputed real property in appellee Mary Pulley (hereinafter defendant), on her counterclaim based on boundary by acquiescence. (R. at 316-303) The appeal in this matter was filed based solely on appellant's (hereinafter plaintiff) third issue on appeal, the only issue set forth in the docketing statement. (See plaintiff's docketing statement) Subsequently, plaintiff filed her brief on appeal which sets forth two additional issues - - issues which were not set forth in the docketing statement.

Plaintiff's first appellate issue - - which alleges a presumption against boundary by acquiescence where adjoining property owners are related - - was not raised or preserved in

1193, 1197 (Utah Ct. App. 1991). Because plaintiff failed to marshal the evidence, the finding of the trial court should be upheld.

Defendant has marshalled the evidence supporting the finding of the trial court, and it is apparent that the evidence supports the trial court finding. Oneida/SLIC v. Oneida Cold Storage et. al., 872 P.2d 1051 (Utah App. 1994). (See Appendix I for marshalling.)

Plaintiff's final issue on appeal is: "Whether the district court improperly found that the two properties were adjoining, and improperly concluded that boundary by acquiescence had been established, where the two properties are not adjoining according to legal description." (Brief of Appellant at 2) This issue is a mixed question of fact and law. The trial court found that the parties are adjoining landowners. (R. at 307) The factual challenge requires marshalling of the evidence. Utah Dept. of Social Services, at 1197. Again, plaintiff has failed to marshal the evidence so it has been marshalled by defendant Mary Pulley. (See Appendix II) Failure to marshal the evidence requires support of the trial court finding, and corresponding legal conclusion. Lake Philgas v. Valley Bank and Trust Company, 845 P.2d 951, 955 (Utah App. 1993), quoting Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991).

Because of plaintiff's failure to preserve the first two issues for appeal, the failure to cite authority for the issues, the failure to marshal the evidence, and the adequacy of the

properly appealed and preserved in a docketing statement, cannot be considered on appeal. Dairyland Ins. Co. v. State Farm Mut, Auto Ins. Co., 882 P.2d 1143, 1144 (footnote 1) (Utah 1994).

Assuming arguendo that plaintiff's first issue is properly before the court, that issue is: "Whether a close family relationship between the property owners in a boundary by acquiescence case creates a presumption of, or carries greater weight as to, nonacquiescence in the artificial boundary."

Plaintiff cites no authority on point from any jurisdiction in support of her argument, but instead argues adverse possession, and prescriptive easement cases by analogy. (Brief of Appellant at 9-10) Plaintiff's argument displays a basic misunderstanding of the peaceful nature of boundary by acquiescence, and the hostile nature of adverse possession and prescriptive easement. Staker v. Ainsworth, 785 P.2d 417 (Utah 1990) quoting Baum v. Defa, 525 P.2d 725, 726 (1974); Olwell v. Clark, 658 P.2d 585, 587 (Utah 1982). If anything, the fact that property owners on opposite sides of a boundary are related strengthens rather than weakens the likelihood of acquiescence in a property boundary.

Plaintiff's second issue on appeal is: "Whether the district court improperly found that the owners of the two properties prior to 1967 mutually acquiesced in the artificial boundary?" (Brief of appellant at 2) This issue is a challenge to a factual finding of the trial court which requires marshalling of the evidence. Utah Department of Social Services v. Adams, 806 P.2d

aware that a different standard should be considered. (R. at 550-551) (See Appendix III)

Plaintiff also failed to raise or preserve at the trial level the second issue on appeal. The issue is: "Whether the district court improperly found that the owners of the two properties prior to 1967 mutually acquiesced in the artificial boundary?" (Brief of Appellant at P.2) Plaintiff claims the issue was raised implicitly at trial and in plaintiff's reply memorandum in support of motion for summary judgment. (R. at 550-551, 102-101) (See Appendix III) As with the previous issue on appeal, plaintiff claims to rely on an implicit conclusory argument of plaintiff's counsel to claim that the issue was preserved for appeal.

At trial, plaintiff's counsel claimed that there was never an argument as to who owned the disputed property. He did not make any argument that there was not acquiescence in the boundary. (R. at 550) Upon examination of the record it is evident that the issue was never raised or preserved.

Plaintiff also claims that the argument was preserved in a reply memorandum filed prior to trial. (Brief of appellant at p.2) The argument in the reply memorandum could not have preserved the issue for appeal. First, the issue which plaintiff has argued on appeal deals with acquiescence in the boundary prior to 1967. (Brief of Appellant at 2) The argument in plaintiff's reply memorandum deals exclusively with acquiescence between plaintiff and the defendant Mary Pulley. (R. at 102-

findings and conclusions of the trial court, plaintiff cannot prevail on her appeal. Such glaring deficiencies conclude that this appeal is frivolous. Defendant should be awarded her attorney's fees and costs. (See Rule 33 Utah Rules of Appellate Procedure)

ARGUMENT

I. PLAINTIFF FAILED TO RAISE OR PRESERVE IN THE COURT BELOW HER FIRST TWO ISSUES FOR APPEAL.

Plaintiff in her brief has raised two points for appeal which were not set forth in her docketing statement, and most importantly, were not preserved for appeal in the court below.

Plaintiff states the first of these issues as: "Whether a close family relationship between the property owners in a boundary by acquiescence case creates a presumption of, or carries greater weight as to, nonacquiescence in the artificial boundary." (Brief of Appellant at 1) Plaintiff claims that this issue was raised implicitly at the trial level. (R. at 550-551) (See Appendix III) Examination of the references to the record cited by plaintiff make it evident that this issue was never preserved for appeal. The record at 550-551 contains a portion of plaintiff's counsel's argument at the conclusion of the trial. In his argument, Plaintiff's counsel makes no argument whatsoever that the presumptions regarding family relationships should change, or that there is a different standard for boundary by acquiescence where family members are present on opposing sides of a boundary. No direct authority is cited in support of the plaintiff's position, and no effort is made to make the court

II. PLAINTIFF FAILED TO PRESERVE HER FIRST TWO ISSUES ON APPEAL IN HER DOCKETING STATEMENT.

In addition to failing to raise or preserve the first two issues for appeal in the trial court, plaintiff also failed to preserve those issues in her docketing statement. In support of her failure to docket the issues, plaintiff cites Nelson by and through Stuckman v. Salt Lake City 919 P.2d 568, 572 (Utah 1996). In Nelson, an appellant was allowed to pursue issues on appeal which were not preserved in the original docketing statement. In that case an amended docketing statement was filed which raised the additional issues. In the case at bar, there has been no amended docketing statement filed, and therefore the issues have not been preserved. If plaintiff is allowed to pursue her first two issues on appeal, without raising them in the docketing statement, or filing an amended docketing statement, defendant Mary Pulley will be prejudiced because she has been denied the opportunity to file a motion for summary disposition on issues which were not docketed. (See Utah Rules of Appellate Procedure rule 10)

In Dairyland Ins. Co. v. State Farm Mut, Auto Ins. Co., 882 P.2d 1143, 1144 (footnote 1) (Utah 1994), the Utah Supreme Court refused to consider issues on appeal which were not properly appealed and docketed as follows:

> . . . Although the Anopols' counsel raised this argument in their brief on appeal, they neglected to appeal this issue by filing a notice of appeal and a docketing statement, and we therefore decline to consider it. See Utah R. App. P. 3 & 9.

Because plaintiff's first two issues were not preserved for

101) (See Appendix III) Plaintiff did not purchase her property until 1979. (R. at 332) There could be no acquiescence between the parties prior to plaintiff's purchase of her property. This argument could not have preserved the issue for appeal.

This court has set forth specific standards for preservation of issues for appeal. In LeBaron v. Rebel Enterprises, Inc., 823 P.2d 479, 482, 483 (Utah App. 1991), this court stated:

> To preserve a substantive issue for appeal, a party must timely bring the issue to the attention of the trial court, thus providing the court an opportunity to rule on the issue's merits. See Turtle Management, Inc. v. Haggis Management, Inc., 645 P.2d 667, 672 (Utah 1982); James v. Preston, 746 P.2d 799, 801-02 (Utah App. 1987). "Issues not raised in the trial court in timely fashion are deemed waived, precluding [the appellate court] from considering their merits on appeal." Salt Lake County v. Carlson,776 P.2d 653, 655 (Utah App. 1989); accord Barson v. E.R. Squibb & Sons, Inc., 682 P.2d 832, 837 (Utah 1984); Franklin Fin. v. New Empire Dev. Co., 659 P.2d 1040, 1045 (Utah 1983). Further, the mere mention of an issue in the pleadings, when no supporting evidence or relevant legal authority is introduced at trial in support of the claim, is insufficient to raise an issue at trial and thus insufficient to preserve the issue for appeal. James, 746 P.2d at 801. This rule is "'stringently applied when the new theory depends on controverted factual questions whose relevance thereto was not made to appear at trial'." Id, (Quoting Bogacki v. Board of Supervisors, 5 Cal. 3rd 771, 489 P.2d 537, 543-44, 97 Cal RPTR. 657, 663-64 (1971) cert. denied, 405 U.S. 1030, 92 S. Ct. 1301 (1972)).

Examination of the record as designated by Plaintiff, (R. at 550-551, 102-101) makes it evident that the plaintiff has failed to preserve the first two issues in her brief for appeal. Those issues cannot be considered by the court.

mutual acquiescence in the line as a boundary. Plaintiff argues that there should be a presumption against acquiescence where the parties on the two sides of the disputed boundary are related. At trial, plaintiff offered no evidence disputing the claim that the line in question was treated as a boundary during the period it was owned by Adolphus Pulley and his wife on one side, and defendant Mary Pulley, or her predecessor in interest on the other. The only evidence regarding whether the line was acquiesced in as a boundary was offered by defendant Mary Pulley. (R. at 467 to 471, 473 to 477, 486 to 490, 493 to 495, 500 to 504)

Plaintiff cites no authority from Utah or any other jurisdiction in support of her argument for a higher standard where persons on opposite sides of a boundary are related. This lack of citation occurs because there is no authority in support of Plaintiff's position.

Because of the lack of authority in boundary by acquiescence cases, Plaintiff attempts to argue adverse possession and prescriptive easement cases by analogy. Such argument demonstrates a fundamental misunderstanding of the doctrines of boundary by acquiescence and adverse possession.

Boundary by acquiescence is a peaceful doctrine. It is based on the premise that sometime in the fairly distant past, adjoining property owners implicitly agreed on a boundary. In Staker v. Ainsworth, 785 P.2d 417, 423 (Utah 1990) the court stated as follows:

appeal or docketed, they cannot be considered by the Court.

III. UTAH LAW HAS NO PRESUMPTION OF NONACQUIESCENCE BETWEEN FAMILY MEMBERS.

Plaintiff's first argument in her brief alleges that a close family relationship between property owners creates a presumption of nonacquiescence in a boundary. (Brief of appellant at 1) Assuming arguendo that this issue were properly preserved for appeal, review of a trial court's conclusions of law must be based on a correction of error standard, granting no deference to the trial court. Marchant v. Park City, 771 P.2d 677, 680 (Utah App. 1989), aff'd, 788 P.2d 520 (Utah 1990); Lake Philgas v. Valley Bank and Trust Company, 845 P.2d 951, 955 (Utah App. 1993).

In her brief, plaintiff correctly sets forth the elements of boundary by acquiescence which when satisfied create a presumption of ownership of the subject property. Englert v. Zane, 848 P.2d 165, 168-169 (Utah App. 1993). Those elements are:

1. Occupation up to a visible line marked by monuments, fences, or buildings.
2. Mutual acquiescence in the line as a boundary.
3. Acquiescence for a period of at least 20 years.
4. The acquiescence in a boundary must be for a period of at least 20 years. Jacobs v. Hafen, 917 P.2d 1078, 1081 (Utah 1996).

In her first argument under point I of her brief, plaintiff concentrates her argument on the second element set forth above:

cooperative, making claims of open, notorious hostile possession more difficult to prove. Because families are presumed to get along and cooperate there is a presumption that they are not adverse to one another for purposes of adverse possession. Smith v. Smith, 511 P.2d 294, 300 (Idaho 1973).

If an analogy can be drawn from the cases cited by plaintiff, the analogy strengthens the argument that members of a family would agree on the location of a boundary.

IV. PLAINTIFF HAS NOT MARSHALLED THE EVIDENCE, THEREFORE FACTUAL DETERMINATIONS OF THE TRIAL COURT ARE BEYOND CHALLENGE.

Plaintiff's second point on appeal asks: "Whether the district court improperly found that the owners of the two properties prior to 1967 mutually acquiesced in the artificial boundary." (Brief of appellant at p. 2) Although this issue is subject to a marshalling standard, plaintiff's brief is an attempt to retry this matter before the appellate court based on selected facts set forth by the plaintiff without marshalling the evidence. Because the plaintiff is challenging the factual findings of the trial court, she is held to a marshalling standard. Christensen v. Munns 812 P.2d 69, 72-73 (Utah App. 1991); Ashton v. Ashton, 733 P.2d 147, 150 (Utah 1987).

Although she failed to marshal the evidence, plaintiff's brief makes it evident that she is attempting to revisit the factual issues of the case rather than examining, as a matter of

law, whether the findings of fact contained within the trial court's findings support the conclusions of law made by the trial court. (Brief of Appellant 11-14) This is why defendant's brief is full of citations to various parts of the record, and is barren of case law.

When an appellant is challenging the sufficiency of the findings of fact of a trial court, a marshalling standard always applies. In Oneida/SLIC v. Oneida Cold Storage et. al., 872 P.2d 1051, 1052-1053 (Utah App. 1994) this court stated:

> Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. To successfully appeal a trial court's findings of fact, appellate counsel must play the devil's advocate. "[Attorneys] must extricate [themselves] from the client's shoes and fully assume the adversary's position. In order to properly discharge the [marshalling] duty ..., the challenger must present, in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which supports the very findings the appellant resists," West Valley City v. Majestic Inv. Co., 818 P.2d 1311, 1315 (Utah App. 1991); accord In re Estate of Bartell, 776 P.2d 885, 886 (Utah 1989); State v. Walker, 743 P.2d 191, 193 (Utah 1987); Commercial Union Assocs. v. Clayton, 863 P.2d 29, 36 (Utah App. 1993); Ohline Corp v. Granite Mill, 849 P.2d 602, 604 (Utah App. 1993). Once appellants have established every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. West Valley City, 818 P.2d at 1314. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" Bartell, 776 P.2d at 886 (quoting Walker, 743 P.2d at 193).

Oneida at 1052-1053.

Because defendant has failed to marshal the evidence, this court cannot consider any factual issues on appeal. "If the evidence is not properly marshalled, we will assume the findings are supported and proceed to review the accuracy of the lower court's conclusions of law and the application of that law in the case." Lake Philgas, at 955, quoting Saunders v. Sharp, 806 P.2d 198, 199 (Utah 1991).

Because this issue is based on a marshalling standard, and plaintiff failed to marshal the evidence, defendant Mary Pulley has marshalled the evidence on this point. (See Marshalled Evidence Appendix I.) The factual findings of the trial court are as follows: (Numbering from original)

> 6. Part of Defendant's 75.85 acre property was immediately north of and adjacent to Plaintiff's property.
>
> 7. In the 1940s, trees and bushes were planted and a fence erected along the tree and bush line between Plaintiff's and Defendant's properties. The fence/tree line marked the boundary line between the Plaintiff's property on the north and the Defendant's property on the south.
>
> 8. From at least 1946 to 1979--some 33 years--Adolphus Pulley and each succeeding owner of the Plaintiff's property from Adolphus Pulley to Charles and Xenna Boyer considered and acquiesced to the fence/tree line as the boundary line between the Plaintiff's and the Defendant's properties.
>
> 9. From at least 1946 to 1979--some 33 years--Defendant Mary Pulley considered and acquiesced to the fence/tree line as the boundary line between the Plaintiff's and the Defendant's properties.

10. From 1946 to present, Defendant Mary Pulley has occupied, possessed, maintained and cared for the property immediately north of the fence/tree line.

11. From 1946 to present, Defendant Mary Pulley has used the property immediately north of the fence/tree line for family and community events.

12. For at least 33 years prior to Plaintiff's ownership of her property, the fence/tree line established the boundary line between the parties' properties.

13. The fence/tree line between the parties' properties has been clearly visible since at least 1946.

Upon review of the marshalled evidence, and the findings of fact of the trial court, it is evident that the owners of the real property on each side of the disputed boundary acquiesced in the boundary prior to 1967. (R. at 315-314) Upon examining the marshalled evidence set forth in Appendix I, it is evident that there is a solid basis in the evidence for each Finding of Fact set forth above. Because they are supported by the record, and because they have not been properly challenged, the findings of the trial court must stand.

V. THE PARTIES TO THIS ACTION ARE ADJOINING LANDOWNERS.

Plaintiff's final point on appeal is that boundary by acquiescence is not applicable to the case at bar, as a matter of law, because there is a description gap evident between the two properties. This challenge comes despite the finding by the trial court that the parties are adjoining property owners. (R.

at 316-304, 302-299)

To properly challenge the trial court's factual finding, plaintiff is obligated to marshal the evidence supporting the trial court's conclusion, then demonstrate why the finding of the trial court is erroneous. Christensen v. Munns 812 P.2d 69, 72-73 (Utah App. 1991); Ashton v. Ashton, 733 P.2d 147, 150 (Utah 1987). Although she is attacking a finding of the trial court, plaintiff has again failed to marshal the evidence. (See argument regarding marshalling requirement in Point IV above); (R. at 309 - 304, R. at 302-299) Because the plaintiff again failed to marshal the evidence, the defendant Mary Pulley has marshalled the evidence in favor of the findings of the trial court. (See Appendix II.)

A close reading of Utah cases demonstrates that when a court is determining whether parties are adjoining property owners for purposes of boundary by acquiescence, the primary consideration is whether the parcels of property are contiguous. In Staker v. Ainsworth, 785 P.2d 417, 420 (Utah 1990) the court stated:

> It is clear that the fourth requirement, that there be adjoining landowners, has been met in this case. Although the various diagrams and maps before the trial court differ somewhat, they all reflect that the parcels involved are contiguous. . . .

Black's Law Dictionary uses the following description for the term contiguous:

> Contiguous: In close proximity; neighboring; adjoining; near in succession; in actual close contact; touching at a point or along a boundary; bounded or traversed by.

In this matter, the court in its findings of fact found that the parties are adjoining landowners. The findings of the trial court fit the above definition very well. The trial court specifically found as follows: (Numbering from original)

> 18. A comparison of the legal descriptions of Plaintiff's and Defendant's properties shows that the respective deeds unintentionally created a narrow description gap between the parties' properties to the north and east of the Plaintiff's property.
>
> 19. The parties' legal descriptions were created from two different marker points of beginning which resulted in the description gap.
>
> 20. The narrow strip of land creating the description gap between the parties' properties was an unintentional and mistaken result of the property description process.
>
> 21. Although surveys and legal descriptions show a gap between the parties' properties, the gap was originally part of the Andrew Pulley property which was subsequently transferred to Defendant Mary Pulley.
>
> 22. Upon Andrew Pulley's transfer to Defendant Mary Pulley of his property, Adolphus and his sister Defendant Mary Pulley became adjoining landowners on the north side of Plaintiff's property.
>
> 23. Plaintiff's property and Defendant's property have been adjoining and are adjoining lots from 1936 to present.

(R. at 307)

The marshalled evidence by Defendant set forth above, supports the trial court's finding that the parties are adjoining

landowners. Because the factual findings are fully supported by the marshalled evidence, and have not been challenged, they must be upheld. Having found that the parties are adjoining landowners, the trial court had no choice but to conclude that boundary by acquiescence had been proven by defendant.

VI. DEFENDANT MARY PULLEY IS ENTITLED TO HER COSTS AND ATTORNEY'S FEES FOR DEFENDING AGAINST A FRIVOLOUS APPEAL.

Rule 33 of the Utah Rules of Appellate Procedure provides as follows:

> (a) **Damages for delay or frivolous appeal.** Except in a first appeal of right in a criminal case, if the court determines that a motion made or appeal taken under these rules is either frivolous or for delay, it shall award just damages, which may include single or double costs, as defined in Rule 34, and/or reasonable attorney fees, to the prevailing party. The court may order that the damages be paid by the party or by the party's attorney.
>
> (b) **Definitions.** For the purposes of these rules, a frivolous appeal, motion, brief, or other paper is one that is not grounded in fact, not warranted by existing law, or not based on a good faith argument to extend, modify, or reverse existing law. An appeal, motion, brief, or other paper interposed for the purpose of delay is one interposed for any improper purpose such as to harass, cause needless increase in the cost of litigation, or gain time that will benefit only the party filing the appeal, motion, brief, or other paper.

In the case at bar, Plaintiff's first issue was not preserved in the trial court or in her docketing statement. For these reasons alone it should not be considered. (See Points I and II above.) Assuming arguendo that the issue was properly preserved, plaintiff has cited no authority from Utah or any

other jurisdiction directly on point in favor of her argument, and has argued a presumption which has never existed in Utah law. (See Brief of Appellant at 7-11) Instead, plaintiff has argued the opposite doctrines of adverse possession and prescriptive easement in an attempt to bolster her case.

Plaintiff's second argument on appeal was not preserved in the court below or in the docketing statement. (See Points I and II above.) Assuming arguendo that the issue is properly before this court, it has been argued by incorrectly applying the standard of review. (See Brief of Appellant at 11-14) The argument is clearly an attack on the factual findings of the trial court, yet there is no marshalling. Standing alone, failure to marshal is sufficient for the court to refuse to consider an issue. (See Point IV above) Instead, plaintiff attempts to re-litigate the case using citations to the record which she believes are favorable to her. Further, the entire argument does not contain a single case supporting plaintiff's position on the issue. (See Brief of Appellant at 11-14)

Plaintiff's final argument is an another attack on the factual findings of the trial court, again with no marshalling of the evidence. (See Brief of Appellant at 14-15) Plaintiff ignores the findings of the trial court, and strains at a unique interpretation of the "adjoining landowners" requirement of

boundary by acquiescence. Again, plaintiff argues only by analogy as there are no Utah cases directly on point.

Considering all of the above factors, it is evident that this appeal is frivolous, and that plaintiff cannot prevail on the issues she has briefed. Further, plaintiff's failure to marshal the evidence as required by the proper standard of review for the issues she has briefed has required the marshalling to be done by defendant Mary Pulley. Responding to issues which were not raised or preserved below, and marshalling the evidence because it was not done by plaintiff, has significantly increased defendant Mary Pulley's attorney's fees and costs for responding to this appeal. Defendant should be awarded her costs and attorney's fees.

In many ways this matter resembles Hunt v. Hurst, 785 P.2d 414, 416-417 (Utah 1990). In the Hunt case, the plaintiff pursued an appeal upon which she could not prevail. The court held that pursuing such an appeal violated Rule 33 of the Utah Rules of Appellate Procedure. The court further held that the issue of frivolity of the appeal was sufficiently raised in the appellee's brief. In Hunt defendant was awarded double costs and attorney's fees.

Under these facts of this case, it is appropriate that this matter be considered a frivolous appeal, and that defendant Mary

Pulley be awarded double costs and attorney's fees pursuant to rule 33 of the Utah Rules of Appellate Procedure.

CONCLUSION

For the reasons set forth above, Defendants request that the Court affirm the decision of the trial court and Quiet Title in Defendant Mary Pulley. Additionally, because Plaintiff failed to preserve her first two issues at the trial level, briefed issues which were not docketed, failed to marshal the evidence, and failed to cite authority in support of her third points on appeal, Defendants are entitled to their attorneys fees and costs based on a frivolous appeal.

DATED this 3rd day of December, 1997.

FISHER, SCRIBNER & STIRLAND, P.C.

BY: 

T. McKAY STIRLAND
DONALD E. McCANDLESS
Attorneys for Defendant/Appellee

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing, postage prepaid, to the following this 3rd day of December, 1997:

Helen H, Anderson
HOWARD, LEWIS & PETERSEN
120 East 300 North
Provo, UT 84601

Donald E McArthur for T. McKay Stirland
T. McKAY STIRLAND
Attorney for Defendant/Appellee

APPENDIX I

MARSHALLED EVIDENCE

Plaintiff's second issue for appeal deals with whether the district court improperly found that the owners of the two properties prior to 1967 mutually acquiesced in the boundary between the properties. This issue is a challenge to the factual findings of the District Court. Whenever a challenge is made to factual findings, the party challenging the factual determination has the obligation to marshal the evidence in favor of the proposition, then demonstrate why the finding was incorrect. (Christensen v. Munns 812 P.2d 69 (Utah App. 1991).

Because plaintiff has failed to marshal the evidence, defendant has marshalled the evidence to demonstrate that the finding of the trial court should be upheld. Because the plaintiff has only challenged one of the elements of boundary by acquiescence, only facts relevant to that element will be marshalled. Further, Plaintiff's challenge to the findings of fact is only directed to the time period prior to 1967, therefore, only findings dealing with events prior to 1967 will be marshalled.

1. John Pulley who was 97 years old at the time of trial was the first witness to testify regarding acquiescence during the time period in question. (R. at 464.) Mr. Pulley was born in an adobe house on the property owned by Defendant Mary Pulley.

Mr. Pulley lived on the property from the time Defendant Mary Pulley's home was built in 1911, until he moved in 1965. (R. at 464, 465) In 1965, Mr. Pulley moved to a property nearby. (R. at 465) Mr. Pulley testified about acquiescence in the boundary as follows: (Quote from 0467 line 25 to 0471 line 13)

Page 0467 line 25

Q. Did Adolphus and Mary or Adolphus and your father ever establish a boundary between their two properties?

A. Yes, it was established. At that time I don't know just where it would be right exactly now, but it was established at that time.

Q. What did they use to establish it?

A. Well, they had trees and --well, there's grass and trees are just about the main.

Q. What kind of trees are they?

A. Juniper.

Q. Did they ever plant any pine trees along that border?

A. Well, on the south border where Adolf lived they put a row along there, yes.

Q. Did they ever put any trees between Adolphus' property on the north and Mary's property?

A. Yes, that was planted into trees along there.

Q. And were those same trees still there?

A. All except for one, and that blew over here about two months ago in a windstorm.

Q. But do you remember about when those trees were planted?

A. They was planted in 1944.

Q. And you lived at the home until the 1960's, correct, at the old Pulley home?

A. Yes. I lived there until I got married, and of course I moved.

Q. While you were living there, did you treat those trees as the boundary between the farm property ad Adolphus' property?

A. Yes.

Q. Did Adolphus treat that as the boundary line to his property, also?

A. Well, yeah, I think so. I would say it was recognized as a boundary.

Q. By whom?

A. By my father who owned the rest of the farm.

Q. And did Adolphus also recognize that boundary?

A. Yeah.

Q. And did he care for the property up to that boundary line?

A. Yes, Adolf took care of that.

Q. And did your father and you and the rest of your family take care of the farm around it?

A. Of course the farm around it would be all the farm east of there, yes.

Q. Who took care of the property between north of Adolphus' property and south of the home -- your home?

A. Mary took care of that.

Q. Was she living in the home at that time?

A. Yes, at that time.

Q. Has she lived there all of her life?

A. Well, until she went on a mission.

Q. Except for her mission?

A. Yeah.

Q. How old is she now?

A. She's 96 years old.

Q. And she took care of that property all the way up to the boundary line by Adolphus'?

A. That's right.

Q. How did she take care of it? What did she do?

A. Well, to take care of, of course, she had mowing equipment -- she rode the mower to cut the grass, and she put in a sprinkling system there to sprinkle the land so it didn't take so much work to water the trees and that.

Q. Did she take pretty good care of that property?

A. Absolutely.

Q. Was the grass usually green?

A. Yeah, it's always green.

Q. And she would usually cut the grass?

A. Yes.

Q. And how long did she do that for?

A. Well, she did that up until about six years ago.

Q. Did you know of any discussion by anybody, or did you ever observe any boundary dispute between that property and Adolphus' property?

A. Well, no. There's a division of trees, but they are still there now.

Q. But you didn't observe any dispute as to the boundary there?

A. No.

2. The second witness regarding the period prior to 1967 was Ron Pulley, a son of Adolphus Pulley, who was one of Plaintiff's predecessors in interest. Mr. Pulley lived on the property now held by Plaintiff from 1943 to 1962, and visited the property regularly for several years after that. (R. at 473 line 25 to 0475 line 4) Mr. Pulley testified about the property line as follows: (Quote 0475 line 5 through line 22), 0476 line 19

through 0477 line 7) (R. at 0484 line 14 through line 25)

Page 0475 Line 5

Q. While you were living there, was there any division between your property or your father's property -- your parents' property and Mary Pulley's property?

A. Yes, there was. The division was the tree line, and we also had a fence that fenced in all the backyard.

Q. And was there a fence along the north side of your property?

A. Yes.

Q. And between the south end and Mary Pulley's?

A. Uh-huh.

Q. What is your earliest recollection of that fence or tree line being there?

A. Well, it was always there. You know, I asked my father about it, you know, what was our property and what was Aunt Mary's property, and that was the dividing line, that was the property line.

Page 0476 Line 19

Q. Was there a fence between your property and Mary Pulley's property?

A. Yes, there was.

Q. And is it in approximately the same place as where the

fence is located now?

A. It's exactly the same place.

Q. When was the last time you were out on the property?

A. I go there all the time. It would have been days, weeks.

Q. And is the fence that's there now pretty much in the same spot as it was when you were growing up as a boy?

A. Yes, the tree line is still there.

Page 0484 Line 14

Q. When you came home from your mission in 1962 or 1963, whenever it was, was the fence still there?

A. It's always been there.

Q. And was it still there then?

A. As far as I could--

Q. Was it still there when you got married?

A. Yes.

Q. When did you get married?

A. In 1965.

Q. So the fence was there during your lifetime, as far as you know, from 1943 until 1965?

A. Yeah, ut's always been there.

3. The next witness was Julie James, a sister of Ron Pulley, and daughter of Adolphus Pulley. Ms. James resided on Plaintiff's property beginning in 1947. (R. at 0486) (Quote 0486 line 24 through 0490 line 19. 0493 line 22 through 0495 line 7)

Page 0486 Line 24

Q. Do you have any recollection of a boundary line or a fence line or a tree line or something between your parents' property and Mary Pulley's property?

A. There was always a very definite line on the north and the south, and it was very definite.

Q. What did it consist of?

A. It consisted of pine trees, bushes, always -- usually flowering bushes, (inaudible) honeysuckle, things like that, because my mother liked those types of things. There was some Chinese Elms.

Q. This is along the north side?

A. On the north side.

Q. Why do you remember those bushed being there?

A. Because we always had to cut them back when the overlapped on Mary's lawn.

We all had a love of flowers, and we always loved the springtime when the flowers would -- you know, because that's why we had them. We liked the spring flowers -- you know, they

always bloomed in the spring and it was very pretty. Our place was just covered with flowers all the time.

Q. What is your earliest recollection of seeing those flowers bloom along the fence line? How old would you say you were?

A. Well, I can remember having pictures taken when I was only maybe two and a half, three. I remember the flowers then.

You know, the bushes were -- when I was small, the trees were pretty small.

Q. These are the trees along the north where the fence is?

A. Uh-huh, but there was a definite line that went back, and then there was always a fence -- the metal fence with the posts that went all the way back to the back where we used to have sheep. It used to be in grass and then it was a garden after I was a little older.

Q. Did your property or your parents' property ever extend beyond the fence line on the north?

A. Never.

Q. Did you or your family ever consider that you owned property beyond the fence line?

A. No. And once you crossed the row of trees you were on Aunt Mary's property, and then on the south it was the Hawthorne trees next to the ditch.

Q. And so you believed or your knowledge was that was the area that your family owned?

A. Yes.

Q. Did Mary care for the property on the north side of the fence?

A. Yes.

Q. What did she do?

A. She mowed the grass, watered it, and the water lines -- you know, it came from the reservoir, and sometimes she would be up all night watering and you could always hear the click of the water heads. It was just something that was always there. She planted flowers.

When I was younger we had -- we used to play there all the time. I mean we had rock gardens and frog ponds, I mean that was -- all the cousins, that's what we did, we had frog ponds and we go hunt frogs. The peacocks and the turkeys and -- I mean it was just there, that was just Aunt Mary's and this was ours.

Q. And the fence line and the tree line divided it?

A. That was a definite line, yes.

Q. And is that same line there today?

A. Yes.

Q. When was the last time you were on the property?

A. Just a little while ago, just maybe a week ago we were-

Q. Have you periodically been on the property during your life?

A. All the time, because that's just like our home. I mean Aunt Mary is our family.

Q. Has that fence line and tree line been there your whole life?

A. Always, my entire life.

Q. Including today?

A. Including today.

Q. And the location of the tree line and the fence line is the same today as it was when you were growing up?

A. It is the same. The trees are bigger, but the fence line is still there, and it's just there.

Q. When was it that you left the property?

A. I was 18 when I got married.

Q. And the fence line was still there?

A. And I was there through my whole life, graduated from high school, got married, and then I moved, but I was there most of the time anyway. You go back home, that's your home.

Page 0493 Line 22

Q. What's your earliest memory of that what you call the fence line there or the border line there? How old were you?

A. As long as I could -- was early enough to remember.

Q. How old would that be?

A. Two and a half, maybe. I can remember having my picture taken, because I was with my brother's dog, Toby. I can remember that distinctly.

Q. How big were the trees then?

A. Well, say if this was ground level, just little. You know, they were not that big, just little.

Q. And there were bushed there?

A. There were bushes, they were planted. There were some bushes that were put in. I think they got them from Stole's Nursery down in American Fork.

Q. What kind of a fence was it?

A. A heavy wire fence like you would use on a farm, a farm fence with T-posts.

Q. There wasn't amu barbed wire?

A. We didn't have barbed wire on our fence that I remember.

Q. How long did you live there?

A. Until I was 18. I graduated from high school in --

Q. Did you ever see them change the fence or fix the fence (inaudible) the fence during the time you were there?

A. Pardon?

Q. Did you ever see them change the fence or fix the fence

while you were there?

A. It has never changes. The only time it ever needed to be fixed is when we -- all us kids would climb over and kind of mash it down a little bit, and it had to be pulled back up.

4. The next witness was Wendell Hansen who was born in Defendant Mary Pulley's home in 1924. (R. at 0496) He lived there until 1944, then moved into Plaintiff's home a few years later where he lived for four more years. (R. at 0497) Mr. Hansen now lives on part of the old Pulley farm. (R. at 0497) Mr. Hansen testified about the boundary between the properties. (Quote R. at line 2 through 0500 line 11) (0501 line 12 to 0502 line 20 (0503 line 17 through 0504 line 8)

Page 0499 Line 2

Q. Was there ever a division between his property and rest of the farm?

A. Always was.

Q. What kind of a division?

A. There was a fence in the back end and the front end, it was shrubbery and the trees.

Q. Did it eventually become a fence between the two properties?

A. Yes.

Q. About when was that, do you know?

A. Probably from about 1950 on.

Q. Did you ever have occasion to go back and forth between the two properties?

A. Yes, I did very much, yes.

Q. Why would you?

A. Well, I used to live in the basement, I used to go out and visit my mother. In fact, I remember even jumping the fence in the back end going up to visit my mother.

Q. How old would you have been then?

A. I'd have been 22 to 24.

Q. Did your mother reside with Mary Pulley her whole life?

A. Yes.

Q. When you were married was she living there?

A. When I got married she was living there. She lived there until she died.

Q. From when to when would she have lived there?

A. Well, she would have lived there from birth until death.

Q. So how old was she when she died?

A. Eighty-three.

Q. So she lived there 83 years.

A. Right.

Page 0501 Line 12

Q. Did you ever see Mary care for the property -- her property that extended to the fence line?

A. You bet.

Q. What did you see her do?

A. She did all the work on what we called her property, and that was that area between the old Pulley home and Adolphus.

Q. Right up to the tree line?

A. Right up to the tree line.

Q. And the tree line consists of those pine trees that are there now?

A. Right. Actually now there's a combination fence, it's a wire fence with -- in fact, it's too high now. She used to have so much problems with plaintiff's dogs that -- in fact, Aunt Mary accused her of cutting holes in the fence to let the dogs through, and that's why she lost all of her birds. She used to have guinea hens -- they all got killed off.

They came up and they would get in her garbage and move the garbage around and then go out and mess all over her lawn, and there were just -- she did not have good feelings toward Christine.

Q. How long has Mary been caring for that area up to the fence?

A. Ever since it was deeded to her.

Q. Up until what point in time? She doesn't still care for it, does she?

A. Well, she still supervises. Now she's mentally incapacitated, but up until that time, yes, I would say about until 1994 she took really good care of it.

Q. Up until about 1994?

A. Uh-huh.

Page 0503 Line 17

Q. The fence that's there today and the tree line that's there today, is that approximately on the same location as the boundary line that you understood it to be since you were a boy?

A. I think it's exactly on the boundary line. Out in front she used to take -- during when she had her Christmas display, she used to put a new fence up every year during that time. And then it got to the point that people would just keep kind of driving in -- in fact, a four wheel drive truck come through there one time and ended up right over in her lot, and it forced her to put up this chain link fence. And that was not put up by the American Fork City, that was put up by Mary Pulley.

Q. You're talking about the fence along this side?

A. Right, on the road.

APPENDIX II

MARSHALLING ON PLAINTIFF'S THIRD ISSUE ON APPEAL

Plaintiff's third issue on appeal is "Whether the district court improperly found that the two properties were adjoining, and improperly concluded that boundary by acquiescence had been established, where the two properties are not adjoining according to legal description." This issue is at least initially a challenge of a finding of fact. Because plaintiff failed to marshal the evidence on this point, defendants have done so as follows:

1. Defendant's first witness regarding whether the properties are adjoining was Brian Allred. Mr. Allred surveyed the property, and testified regarding the effect of the various deeds, the creation of the description gap, and the fact that the properties were adjoining. (Quote R. at 0404 line 15 to 0406 line 18) (0408 line 4 to 0416 line 9)

Page 0404 Line 15

Q. Let me show you another deed that we'd like to submit for admission. This is a deed from Andrew Pulley to Adolphus Pulley, isn't it?

A. Yes.

Q. Does it say on there the date?

A. Yeah, January 9, 1935. That was the recording date

that looks like.

Q. That was Andrew Pulley to Adolphus Pulley, is that what it says on there?

A. Yes.

Q. And about how much was that, the acreage?

A. It says one acre, "area 1.00 acre."

Q. And have you indicated -- did you on this particular graph, did you -- have you mapped out where that particular plot of property would be?

A. The legal description, yes.

Q. And where would that be?

A. Well, it extends north of the fence line.

Q. Would it be right here, this line that I'm tracing with my finger, that's indicated by the Stokes, the 2 (inaudible) word "Stokes" up here north? The solid line with a dot?

A. Going from the line where it says, "Boley," the line north of that up to the line that's north of the fence line.

Q. And the fence line is indicated by what?

A. Little x's through the end of the line.

Q. So that solid line about the Stokes word that has the little x's?

A. Yeah.

Q. So you're saying that this acre deeded to Adolphus by

Andrew is indicated by the dotted line about the word "Boley," to the dotted line above Stokes?

A. Yeah, indicated by a long dot, long dot.

Q. So before any of these divisions now, when Andrew Pulley received the approximately 84 acres from the Featherstones, did that include both the Adolphus Pulley or the Stokes property and the Mary Pulley property where the home is and the few acres?

A. Yes, it included them both with the exception of a little overlap there at the top -- underlap, whatever.

Q. And so all of this area within the pink was one piece of property?

A. Yeah.

Q. And you've been in the courthouse today, and we've talked about the disputed piece that the plaintiff is claiming, we've talked about some property gaps, et cetera?

A. Uh-huh.

Q. And this one piece of property includes all of those areas, correct?

A. Yes.

Page 0408 Line 4

Q. The area that's highlighted in blue on this particular

exhibit, what does that indicate?

A. This fence line around the Mary Pulley's property.

Q. And this at the bottom here above the word, "Stokes," os the fence line (inaudible) we've received testimony on today?

A. Yes.

Q. Between the Stokes property and the Pulley property?

A. Uh-huh.

Q. And then there is a little blue line down here at the bottom above the word, "drive." Is that a fence line also?

A. It is.

Q. Then we have another line that's green. What does that indicate?

A. That's the Mary Pulley legal description.

Q. And then this long dotted line in yellow, what is that?

A. That's the Stokes legal description.

Q. And then these other dotted line that aren't colored, they are just other deeds?

A. Surrounding deeds, yes.

MR. STIRLAND: I'd like to offer that into evidence, your Honor.

THE COURT: Any objection to 7?

MR. LOW: No.

THE COURT: Very well, 7 is received. (Exhibit No. 7

received into evidence)

THE WITNESS: I think technically that (inaudible) one at the north is a right-of-way. I can't remember now.

Q. MR. STIRLAND: That is not at issue. There's an area here between the yellow line on this particular exhibit and the green line.

A. Uh-huh.

Q. What is that area?

A. Description gap.

Q. Description gap?

A. Yeah.

Q. Over here on our first exhibit we have here one deed, and it includes all this property, correct?

A. Yeah.

Q. The deed from Featherstone to Andrew Pulley?

A. Uh-huh.

Q. But yet now, looking at the Mary Pulley deed and the Stokes property, we have a description gap between the two properties?

A. Right.

Q. In an area that was once one property?

A. Apparently.

Q. Do you have any idea what would have caused that

description gap?

MR. LOW: Objection, your Honor, foundation first as to how he would know. I don't object to his testimony, I just want to make sure we know how he knows before he (inaudible).

THE COURT: All right, I'll sustain the objection.

Q. MR. STIRLAND: Let me just lay a little bit of foundation, okay?

A. Sure.

Q. What is your degree, your advanced degree? Do you have an advanced degree?

A. I have a degree in English and one in mechanical engineering.

Q. And you're employed as the -- what was it again?

A. Property survey manager.

Q. For Daley & Associates?

A. Yes.

Q. And you're responsible for directing surveys and then mapping out those -- that information?

A. I collect the field data and put it on a computer and then take the legal descriptions and put it on a computer, match them up and try to determine where the property line should be.

Q. Do you have any experience or knowledge relating to gaps in property descriptions or plat maps?

A. Yes, we quite often see them. Most people think that it's a legal description, it's cast in iron, and as far as it goes it is. But we often see gaps between properties.

Q. When you say, "we," meaning?

A. Well, myself and other people that work in the office. I'm not the only one who puts in things on the computer.

Q. So by the nature of your employment and the company that you work for, you've had the opportunity to study legal descriptions and gaps and how they occur?

A. Yes.

MR. STIRLAND: Is that enough?

Mr. LOW: What's your question going to be?

MR. STIRLAND: My next question is going to be, "do you have an opinion as to why there's a gap in this particular area?"

Mr. LOW: Maybe (inaudible) he's there, and does he know any history (inaudible).

Q. MR. STIRLAND: Are you familiar with particular area of the maps and plats and the legal descriptions of this area.

A. Yes.

Q. We've gone through all the deeds, the Pulley deeds, the Andrew to Adolphus deed. We've gone through the Featherstone to the Andrew Pulley deed, we've gone from the Andrew Pulley deed to the Mary Pulley deed, correct?

A. Yeah.

Q. And you've read all those and you've calculated all those out, correct?

A. Yeah, from the records and physical things, yeah.

Q. Could you tell us, in your opinion, why there would be a gap here between the yellow property and the green property?

A. I see it quite often. It's mainly because when they -- this is just based on how evidence stacks up later on, a section is an ideal entity. It's supposed to be one mile by one mile. And when surveyors came out to do the original subdividing into sections, to take a township and divide it into sections, that's what they're shooting for.

But for one reason or another, my assumption is inaccuracies in their instruments, the sections are never ever exactly one mile by one mile. Around here I see mostly they are a little bigger, and so you've got a section that's supposed to be one mile on each side and it's actually got an additional -- well, sometimes it's smaller, but often -- mostly it's bigger around here, 30 to 70 feet or whatever.

Q. So typically how would surveyors, when they came into a township, how would they mark out a section of property? I mean, would they place markers?

A. Well, yes, they put markers at the corners.

Q. And they would measure from that area, typically, from most points?

A. Yeah. And from then on the descriptions refer to the markers, the monuments, the actual -- now they put in brass tacks, originally that put in stone mounds. Our county is very good at mapping those and recording where they sit in reality to each other.

Q. And once in this particular area, the section was measured and the monuments or the markers were established, then if there was any activity as far as selling or transferring or dividing the property, it would refer to those markers, correct?

A. Yes.

Q. So how is it, then, that we get the gap here, in your opinion?

A. Well, as I was saying, the Stokes' property is called from the west quarter corner--

Q. Would that be down--

A. Which is half way between the northwest corner and the southwest corner -- I mean approximately half. It is where it is. And then the Pulley property is called from the center section, which is -- well, there is no monument there, you have to calculate that.

Q. So you're saying that the legal description for the

Pulley deed and the legal description for the Stokes deed, they didn't start necessarily from the same corners?

A. Right.

Q. They started from different corners?

A. Right.

Q. And how would that have resulted in a gap, or how would that affect the legal descriptions?

A. Well, if the markers are longer than the -- theoretical, I think, for a half of it is 400,200 -- whatever it is -- it's feet. If the distance is greater than it is in theory, and they haven't had a surveyor out there to see and indicate that, and they are writing it from the theory, then that would pull them apart -- pull the descriptions apart, because from a theoretical corner on the other side, in reality they are further apart then they are supposed to be, and that would pull them apart.

Q. Even though they might be adjacent pieces of property, the legal descriptions started from different corners could result in the gap?

A. Yes.

Q. But it is your testimony that at one time, at least in 1887, that entire area was one piece of property?

A. By the Featherstone, yes.

Q. Yes, by the Featherstone, Andrew Pulley deed?

A. Yeah.

Q. In your review of this area and the legal descriptions, did you notice any other, or come across any other deeds to individuals of property in this area except for Andrew to Mary, Andrew to Adolphus and then Adolphus Pulley to the Madsens and then the Boyers and then the Stokes and McCrimmons?

A. No, I didn't notice anybody else involved in that.

2. The evidence marshalled above regarding mutual acquiescence would also go to whether the properties are adjoining. Because that evidence is marshalled above, it will not be repeated.

APPENDIX III

550 line 8 to 551 line 5:

Well, that's now. The second requirement is that the mutual acquiescence in the line as a boundary. Okay, so there's two elements of this requirement, too. There's mutual acquiescence, and in treating the line as a boundary.

In the mutual acquiescence facet of it, the way I interpret that -- I think that's appropriate is that they both agree that that's a boundary, or should be treated as a boundary.

Now for years, I guess, that land was owned by Pulleys on both sides of it, and it didn't seem to ever become an argument as to whether who owned what. But it certainly doesn't match up to those cases where -- for example, in one case -- this was proven because the party on one side of the fence tried to buy the land on the other side of the fence, an so the Court decided, "Well, that's obviously acquiescing because they thought it was the other person's land so they tried to buy it."

Well, that didn't happen here. There's been no admission by anybody that they did not own that land on the other side. Again, it was Pulleys on both sides of that land.

R. at 102-101 in pertinent part:

2. <u>There has never been mutual acquiescence in the fence line boundary.</u>

As stated above, defendant Pulley had knowledge of the true boundary. Certainly, Ms. Stokes has known the boundary since 1979, or at worse, 1989. Ms. Stokes has watered the property and

attempted to build fences on the property. In addition, Ms. Stokes has continually paid taxes on the property. In 1990, as can be seen by the tax receipts and records, the property was split for tax purposes. Ms. Stokes actually pays a separate tax bill on the disputed property. The tax bill comes to the plaintiff's address in the plaintiff's name. None of these facts are disputed by the defendants. There has never been mutual acquiescence in the fence line as the boundary.

The law requires *mutual* acquiescence, In this case, neither side has acquiesced. Defendant Pulley effectively used the land through a lease and is now claiming ownership. This is improper and does not meet the requirements of the boundary by acquiescence doctrine. The plaintiff has stated that she has never conceded that the fence line was the boundary. Therefore, mutual acquiescence is impossible, and the plaintiff's motion for summary judgment should be granted.

APPENDIX IV

T. McKAY STIRLAND, 5800
DONALD E. McCANDLESS, 5313
FISHER, SCRIBNER & STIRLAND, P.C.
2696 No. University Ave., Suite 220
Provo, UT 84604
(801) 375-5600
Attorneys for Defendants

IN THE FOURTH JUDICIAL DISTRICT COURT

OF UTAH COUNTY, STATE OF UTAH

CHRISTINA R. STOKES,	:	
Plaintiff,	:	**FINDINGS OF FACT AND**
vs.	:	**CONCLUSIONS OF LAW**
MARY J. PULLEY, WENDELL HANSEN, CAMILLE FOWLER, JIM FOWLER, TRAVIS HANSEN, TROY HANSEN, AND REGAN HANSEN,	:	Civil No. 940400337 (Judge Harding)
Defendants.	:	

This matter came before the Court for a non-jury trial on the 21st day of March, 1996, the Honorable Ray M. Harding, District Court Judge, presiding. Plaintiff was present and represented by Thomas L. Low and Defendants were represented by T. McKay Stirland. Having heard the evidence presented and counsels' arguments and being fully advised in the premises, the Court hereby enters the following Findings of Fact and Conclusions of Law and incorporates herein by reference its Memorandum Decision dated April 12, 1996:

FINDINGS OF FACT

1. In 1887, Thomas and Emma Featherstone deeded approximately 84 acres of real estate in American Fork, Utah to

Andrew Pulley, father of Defendant Mary Pulley. The property is more particularly described as:

> Begin at the center of Section 18, T. 5, S.R. 2. E. then running West 32.72 chains, then North 16.00 chains, then West 7.28 chains, then North 10.00 chains then East 25.00 chains, then South 6.50 chains, then East 15.00 chains, then South 20.00 chains to the place of beginning. Area 85 acres and 40 rods of land. All in this N.W. 1/4 and Lots 2, Section 18, T. 5, S.R. 2. E. Salt Lake Meridian United States Survey, Utah County, Territory of Utah.

(Hereinafter referred to as "the Andrew Pulley property.")

2. In 1934, Andrew Pulley deeded approximately one acre of his land to his son, Adolphus Pulley. The one acre is more particularly described as:

> Beginning 16.50 chains North of the Southwest corner of the Northwest quarter of Section 18, Township 5 South, Range 2 East of the Salt Lake Base and Meridian; thence North 2.50 chains East 4.00 chains; thence South 2.50 chains; thence West 4.00 chains to the place of beginning. Area 1.0 acres

(Hereinafter referred to as "the Plaintiff's property.")

3. The approximate one acre parcel deeded to Adolphus Pulley from Andrew Pulley is the same parcel which is presently owned by Plaintiff.

4. The property immediately north of and adjacent to the Plaintiff's property remained part of the original Andrew Pulley property after Andrew Pulley deeded the one acre parcel to Adolphus Pulley.

5. In 1946, Andrew Pulley deeded approximately 75.85 acres of his property to his daughter, Defendant Mary Pulley, which was

more particularly described as follows:

> Beginning at the center of Section 18, Township 5 South, Range 2 East, Salt Lake Base and Meridian; thence West 27.15 chains; thence North 33 1' East 12.58 chains; thence South 85 56' West 6.18 chains; thence North 4.58 chains; thence West 3.28 chains; thence North 2.50 chains; thence West 4.00 chains; thence North 7.00 chains; thence East 25.00 chains; thence South 6.50 chains; thence East 15.00 chains; thence South 20.00 chains to place of beginning. Area 75.85 acres more or less.

(Hereinafter referred to as "the Defendant's property.")

6. Part of Defendant's 75.85 acre property was immediately north of and adjacent to Plaintiff's property.

7. In the 1940s, trees and bushes were planted and a fence erected along the tree and bush line between Plaintiff's and Defendant's properties. The fence/tree line marked the boundary line between the Plaintiff's property on the north and the Defendant's property on the south.

8. From at least 1946 to 1979--some 33 years--Adolphus Pulley and each succeeding owner of the Plaintiff's property from Adolphus Pulley to Charles and Xenna Boyer considered and acquiesced to the fence/tree line as the boundary line between the Plaintiff's and the Defendant's properties.

9. From at least 1946 to 1979--some 33 years--Defendant Mary Pulley considered and acquiesced to the fence/tree line as the boundary line between the Plaintiff's and the Defendant's properties.

10. From 1946 to present, Defendant Mary Pulley has occupied,

possessed, maintained and cared for the property immediately north of the fence/tree line.

11. From 1946 to present, Defendant Mary Pulley has used the property immediately north of the fence/tree line for family and community events.

12. For at least 33 years prior to Plaintiff's ownership of her property, the fence/tree line established the boundary line between the parties' properties.

13. The fence/tree line between the parties' properties has been clearly visible since at least 1946.

14. On March 19, 1979, the Plaintiff and Roderick McCrimmon purchased from Charles and Xenna Boyer the one acre parcel originally owned by Adolphus Pulley and identified herein as the Plaintiff's property.

15. On May 23, 1979, Roderick McCrimmon deeded his interest in the Plaintiff's property to the Plaintiff.

16. On March 19, 1979 or sometime thereafter, Plaintiff came to believe that her one acre property extended "twenty plus" feet to the north of the fence/tree line between Plaintiff's and Defendant's properties.

17. The legal description of Plaintiff's property places her northern boundary line approximately 43 feet immediately to the north of the fence/tree line between Plaintiff's and Defendant's properties.

18. A comparison of the legal descriptions of Plaintiff's and Defendant's properties shows that the respective deeds unintentionally created a narrow description gap between the parties' properties to the north and east of the Plaintiff's property.

19. The parties' legal descriptions were created from two different marker points of beginning which resulted in the description gap.

20. The narrow strip of land creating the description gap between the parties' properties was an unintentional and mistaken result of the property description process.

21. Although surveys and legal descriptions show a gap between the parties' properties, the gap was originally part of the Andrew Pulley property which was subsequently transferred to Defendant Mary Pulley.

22. Upon Andrew Pulley's transfer to Defendant Mary Pulley of his property, Adolphus and his sister Defendant Mary Pulley became adjoining landowners on the north side of Plaintiff's property.

23. Plaintiff's property and Defendant's property have been adjoining and are adjoining lots from 1936 to present.

24. No evidence was presented showing that any of the Defendants committed any act of trespass against the Plaintiff.

CONCLUSIONS OF LAW

1. The Court concludes, as a matter of law, that under the

doctrine of boundary by acquiescence, property rights are determined based upon actual possession of land.

2. The Court concludes, as a matter of law, that Defendant Pulley must prove boundary by acquiescence by showing: (1) occupation up to a visible line marked by monuments, fences or buildings; (2) mutual acquiescence to the line as a boundary; (3) for a long period of time, generally not less than 20 years; (4) by adjoining land owners.

3. The Court concludes, as a matter of law, that once Defendant Mary Pulley has established each element of boundary by acquiescence then she is entitled to a presumption of ownership.

4. Defendant Mary Pulley has, as a matter of law, proven and established her (1) occupation of the disputed property up to a visible line marked by fence, trees and bushes; (2) mutual acquiescence to the line as a boundary by all property owners from at least 1946 to 1979; (3) for at least 33 years; (4) by adjoining land owners.

5. From 1946 to present, the Defendant Mary Pulley has occupied the disputed area up to a line marked by trees, bushes and fence.

6. From at least 1946 to 1979--some 33 years--the owners of Plaintiff's property and Defendant's property mutually agreed that the fence/tree line was the boundary line between the two properties.

7. The narrow strip of land shown as a description gap between the parties' property was an unintentional and mistaken result of the property description process.

8. Plaintiff's property and Defendant's property have been and are adjoining parcels of property from 1934 to present.

9. The property extending south to the fence/tree line on the northern side of Plaintiff's property, including the narrow strip of property shown as a description gap, shall be quieted in favor of Defendant Mary Pulley.

10. The Plaintiff's deed and the Defendant's deed shall be reformed to conform with the existing fence/tree line.

11. Defendant Mary Pulley's deed shall be reformed to conform with the existing configuration of the property on which she resides, occupies and maintains, according to the fence line surrounding her property, specifically, the trees, bushes, and fencing bordering her property to the south shall be the southern boundary line of her property.

12. Plaintiff's deed shall be reformed to conform with the existing configuration of the property on which she resides according to the fence line surrounding her property, specifically, the trees, bushes, and fencing bordering her property to the north shall be the northern boundary line of her property.

13. None of the Defendants committed any trespass against Plaintiff.

14. The Plaintiff is not entitled to damages for trespass.

15. Each party shall bear their own attorneys' fees and costs.

DATED this 21 day of May, 1996.

BY THE COURT:

RAY M. HARDING
District Court Judge

APPROVED AS TO FORM:

Thomas L. Low

HAND-DELIVERY CERTIFICATE

I hereby certify that I hand-delivered a true and correct copy of the foregoing to the following this 7 day of May, 1996:

Thomas L. Low
3507 N. University Avenue
Suite 370
Provo, Utah 84604

Marilyn Lundberg

APPENDIX V

IN THE FOURTH JUDICIAL DISTRICT COURT

UTAH COUNTY, STATE OF UTAH

CHRISTINA R. STOKES, Plaintiff, v. MARY J. PULLEY, Defendant.	**MEMORANDUM DECISION** CASE NO. 940400337 DATE: April 12, 1996 JUDGE: RAY M. HARDING LAW CLERK: Larry Meyers DEPUTY CLERK: Georgia Snyder

This matter came before the Court for a nonjury trial on March 21, 1996. The Plaintiff was present and represented by Thomas L. Low. The Defendant was present and represented by McKay Stirland. Having heard the evidence and counsels' arguments, the Court hereby rules as follows.

Factual Background

The parties in this case are neighbors, residing to the east of 4800 West in American Fork, Utah County, Utah. The Plaintiff has brought this action to quiet title to a section of real property along a boundary of the parties' properties.

In 1887, Thomas and Emma Featherstone deeded approximately 84 acres of real estate in American Fork, Utah, to Andrew Pulley. In 1935, Andrew Pulley deeded approximately one acre of his land [hereinafter referred to as "the Plaintiff's property"] to his son, Adolphus Pulley. In 1946, Andrew Pulley deeded approximately 75.85 acres of his land [hereinafter referred to as "the Defendant's property"] to his daughter, the Defendant in this case. The Defendant's property lies to the north and to the east of the Plaintiff's property. The disputed boundary is the northern line of the Plaintiff's property.

At some point during the 1940s, trees and bushes were planted, and a fence was

erected along the tree line, to mark the boundary line between the Plaintiff's property on the north and the Defendant's property on the south. From then until 1979, each succeeding owner of the Plaintiff's property--from Adolphus Pulley to Charles and Xenna Boyer--considered the fence/tree line to be the boundary between the two lots. And from 1946 to the present, the Defendant has maintained and cared for the property to the north of the tree\fence line. She has also used that area for family and community events.

On March 19, 1979, the Plaintiff and Roderick McCrimmon purchased from the Boyers the one acre lot that had originally belonged to Adolphus Pulley. At that time or at some later date, the Plaintiff came to believe that her property extended "twenty plus" feet north of the tree\fence line. On May 23, 1979, Mr. McCrimmon deeded his interest in the property to the Plaintiff.

Supporting the Plaintiff's belief that her property extends beyond the tree\fence line is the fact that the legal description of the Plaintiff's property places her northern boundary approximately 43 feet to the north of the tree\fence line. Adding to the confusion, a comparison of the legal descriptions of the parties' properties shows that the respective deeds unintentionally created a narrow strip of land dividing the parties' properties on the north and east of the Plaintiff's property. The discrepancy was caused because the two legal descriptions were created beginning at two different marker points.

The Plaintiff asks the Court to quiet title to a 43-foot-wide strip of property north of the tree\fence line in her favor. The Plaintiff also requests damages for a tree in the disputed area which, after being toppled by a microburst wind, was allegedly cut up and hauled away by the Defendant and the co-defendants in this case.

The Defendant responds that the Court should quiet title, under the doctrine of boundary by acquiescence, by declaring the tree\fence line to be the southern boundary of that portion of her property which is contingent to the Plaintiff's property.

Opinion of the Court

Under the doctrine of boundary by acquiescence, property rights are determined based

on actual possession of land. *Olsen v. Park Daughters Inv. Co.*, 29 Utah 2d 421, 511 P.2d 145, 147 (1973). The party seeking to prove boundary by acquiescence must show: (1) occupation up to a visible line marked by monuments, fences or buildings; (2) mutual acquiescence to the line as a boundary; (3) for a long period of time, generally not less than 20 years; (4) by adjoining landowners. *Staker v. Ainsworth*, 785 P.2d 417, 420 (Utah 1990); *Englert v. Zane*, 848 P.2d 165, 168 (Utah App. 1993). Once that party has established each element, the party is entitled to a presumption of ownership. *Englert*, 848 P.2d at 169; *Fuoco v. Williams*, 421 P.2d 944, 946 (Utah 1966).

The Court finds that the Defendant has shown boundary by acquiescence. From 1946 until the present, the Defendant occupied the disputed area up to the line marked by the trees, bushes, and fence. From at least 1946 to 1979--some 33 years--the owners of the two lots mutually agreed that the tree\fence line was the boundary. Finally, as the Court finds that the creation of a narrow strip of land between the two properties was an unintentional and mistaken result of the property description process, the Court concludes that the Plaintiff's property and the Defendant's property have been and are adjoining lots. *Cf. Affleck v. Morgan*, 12 Utah 2d 200, 203-04 (Utah 1961) ("When a section line is discovered to be in error it does not mean that the landowners must readjust their property lines to conform to the resurvey.").

Based on the Defendant's showing, the Court hereby quiets title in favor of the Defendant by holding that the Defendant's property extends south to the tree/fence line on the northern side of the Plaintiff's property. The Defendant's and Plaintiff's deeds shall be reformed to conform with the existing tree/fence line. The Court further holds that the Plaintiff is not entitled to damages for trespass. Each party is to bear its own attorney's fees.

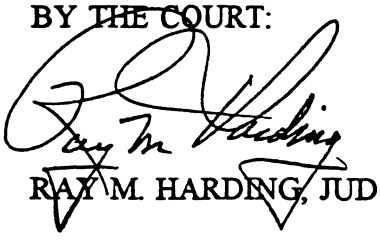
Order

Counsel for the Defendant is to prepare Findings of Fact, Conclusions of Law, and an order of Judgment within 15 days of this decision consistent with and in support of the terms of this memorandum and submit those documents to opposing counsel for approval as to form

prior to submission to the Court for signature. This memorandum decision has no effect until such are signed by the Court.

Dated this 12th day of April, 1996.

BY THE COURT:



RAY M. HARDING, JUDGE

cc: T. McKay Stirland, Esq.
Thomas L. Low, Esq.